STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of **DOUGLAS AND GAYLE CAIRES** for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Years 1992 and 1993.	DETERMINATION DTA NO. 818986

Petitioners, Douglas and Gayle Caires, 2971 Shore Drive, Merrick, New York 11566, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income tax under Article 22 of the Tax Law and the Administrative Code of the City of New York for the years 1992 and 1993.

On September 6, 2002, the Division of Taxation filed a motion for an order dismissing the petition and granting summary determination to the Division of Taxation on the ground that there are no material issues of fact and that the facts mandate a determination in favor of the Division of Taxation. Petitioners' response was due October 7, 2002 which started the 90-day period for issuing this determination. The Division of Taxation appeared by Barbara G. Billet, Esq. (Kevin R. Law, Esq., of counsel). Petitioner Douglas Caires appeared *pro se* and on behalf of his wife, Gayle Caires. Based upon the pleadings and motion papers, Arthur S. Bray, Administrative Law Judge, renders the following determination.

ISSUES

I. Whether the Division of Taxation's assertion of a deficiency for the years 1992 and 1993 on the basis of Federal audit changes was proper and, if so, whether summary determination should be granted in favor of the Division of Taxation because there are no facts in dispute and the facts mandate a determination in favor of the Division.

II. Whether a penalty should be imposed upon petitioners, pursuant to Tax Law § 2018, for the filing of a frivolous petition.

FINDINGS OF FACT

1. New York State income tax returns were filed jointly by petitioners for the years 1992 and 1993.

2. Federal audit changes are routinely reported by the Internal Revenue Service ("IRS") to New York State. This information is matched to the taxpayer's New York State return and, if necessary, adjustments are made. In this instance, the Division of Taxation received a Statement of Income Tax Audit Changes from the IRS indicating that there had been an increase in petitioners' Federal taxable income which resulted in an increase in their Federal tax liability for the years 1992 and 1993 in the amounts of $945.00 and $3,469.00, respectively. The adjustments were agreed to by petitioners and the IRS. Petitioners did not report the Federal audit changes to the Division. The information from the IRS prompted the Division to issue notices of additional tax due on the basis of the increase in Federal taxable income.

3. The Division issued two notices of additional tax due, dated June 5, 2000, which asserted deficiencies of New York State and New York City personal income tax as follows:

Year	Jurisdiction	Tax Due	Interest	Penalty	Balance
1992	NYS	$ 497.00	$ 340.62	$ 204.91	$ 1,042.53
1992	NYC	$ 269.00	$ 184.36	$ 110.90	$ 564.26
1993	NYS	$ 1,260.00	$ 739.89	$ 454.58	$ 2,454.47
1993	NYC	$ 695.00	$ 408.11	$ 250.73	$ 1,353.84

The notices stated that petitioners were required to report any changes to their Federal taxable income.

4. Petitioners filed a petition challenging the asserted deficiencies of tax on three grounds: the asserted deficiencies of tax were barred by the statute of limitations; petitioners were not taxpayers required to file a report of Federal audit changes; and, the United States Constitution protects petitioners from a direct tax that is not apportioned among the several states.

5. Petitioners filed an affirmation in support of their position and a cross-motion for summary determination. However, the document was filed late (***see***, 20 NYCRR 3000.5[b]) and was disregarded.

SUMMARY OF THE DIVISION'S POSITION

6. The Division asserts that all taxpayers, including petitioners, have an obligation to report Federal audit changes. It also contends that since petitioners failed to report the Federal audit changes to New York State, the tax could be assessed at any time. Further, the Division posits that the U.S. Constitution does not protect petitioners from a direct tax assessed without apportionment. According to the Division, there are no material issues of fact or law that would warrant a hearing and the Division's assertion of tax due is correct as a matter of law. Lastly, the Division requests that a penalty be imposed against petitioners for filing a frivolous petition.

CONCLUSIONS OF LAW

A. To obtain summary determination, the moving party must submit an affidavit, made by a person having knowledge of the facts, a copy of the pleadings and other available proof. The documents must show that there is no material issue of fact and that the facts mandate a determination in the moving party's favor (20 NYCRR 3000.9[b][1]). Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (***Glick & Dolleck, Inc. v. Tri-Pac Export Corp.***, 22 NY2d 439, 293 NYS2d 93, 94; ***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 AD2d 572, 536 NYS2d 177, 179). If material facts are in dispute, or if contrary inferences may be drawn reasonably from undisputed facts, then a full trial is warranted and the case should not be decided on a motion (***see***, ***Gerard v. Inglese***, 11 AD2d 381, 206 NYS2d 879, 881).

B. During the period in issue, Tax Law former § 659 provided, in pertinent part, as follows:

> If the amount of a taxpayer's federal taxable income . . . reported on his federal income tax return for any taxable year . . . is changed or corrected by the United States internal revenue service or other competent authority . . . the taxpayer . . . shall report such change or correction . . . within ninety days after the final determination of such change, correction, . . . or as otherwise required by the commissioner, and shall concede the accuracy of such determination or state wherein it is erroneous.

C. Here, the notice states that petitioners were required to report any changes to their Federal taxable income. In response, petitioners have not challenged the conclusion that there was a final Federal determination of a change in taxable income. In addition, petitioners did not contest the Division's assertion that the Federal determination was not reported to New York State as required by Tax Law former § 659. In view of petitioners' failure to comply with Tax

Law former § 659, the Division's issuance of the notices of additional tax due for the years 1992 and 1993 was correct (***Matter of Migliore***, Tax Appeals Tribunal, January 17, 1991).

D. Petitioners contend that the asserted deficiencies of tax were barred by the statute of limitations. In support of this position, petitioners submit that their returns for the years in issue were timely filed.

E. In general, New York State personal income tax must be assessed within three years after the return was filed (Tax Law § 683). However, the tax may be assessed at any time if a taxpayer fails to comply with Tax Law § 659 (Tax Law § 683[c][1][C]). As noted above, petitioners were required to report the Federal audit changes within 90 days after the final determination of such change (Tax Law § 659). Here, it is undisputed that there was a determination which finally and irrevocably adjusted petitioners' Federal income tax liability and, in contravention of Tax Law § 659, they did not advise the Division of the Federal audit changes. Therefore, the notices were not barred by the statute of limitations.

F. Petitioners maintain that Tax Law § 659 does not apply to them. In particular, petitioners focus upon the portion of this section which states:

> For purposes of this section, (i) the term "taxpayer" shall include a partnership having a resident partner or having any income derived from New York sources, and a corporation with respect to which the taxable year of such change, correction, disallowance or amendment is a year with respect to which the election provided for in subsection (a) of section six hundred sixty of this article is in effect . . . .

It is petitioners' position that there is nothing in this section which refers to individual citizens and therefore, the provisions of Tax Law § 683 do not apply. This argument is specious. In general, the ordinary everyday meaning of the term is to be applied when interpreting words of ordinary import (***Matter of Leisure Vue v. Commissioner of Taxation and Fin.***, 172 AD2d 872, 568 NYS2d 175,176; ***Matter of Clark***, Tax Appeals Tribunal, September 14, 1992; McKinney's

Cons Laws of NY, Book 1, Statutes § 232). On its face, the section states that the term taxpayer "includes" certain partnerships and corporations. It does not state that it includes *only* partnerships and corporations. Clearly, petitioners are taxpayers within the meaning of Tax Law § 659.

G. As noted, petitioners argue that the United States Constitution protects them from a direct tax which is not apportioned among the several states. In response to a similar argument, the United States Court of Appeals has concluded that the argument that the income tax is a direct tax which is invalid unless apportioned is "completely lacking in legal merit and patently frivolous. . . ." (***Lonsdale v. United States***, 919 F2d 1440).

H. Tax Law § 2018 permits the imposition of a penalty for the filing of a frivolous petition and authorizes the Tax Appeals Tribunal to promulgate regulations as to what constitutes a frivolous position. 20 NYCRR 3000.21, promulgated in accordance with this authority, provides as follows:

> If a petitioner commences or maintains a proceeding primarily for delay, or if the petitioner's position in a proceeding is frivolous, the tribunal may, on its own motion or on the motion of the office of counsel, impose a penalty against such petitioner of not more than $500. This penalty shall be in addition to any other penalty provided by law, and shall be collected and distributed in the same manner as the tax to which the penalty relates.

In its answer, the Division requested that the Division of Tax Appeals impose the maximum penalty for filing a frivolous penalty, i.e., $500.00. In this case, each of the arguments raised by petitioners were patently frivolous. Therefore, it is determined that the imposition of a frivolous petition penalty, in the amount of $500.00, pursuant to Tax Law § 2018, is appropriate.

I. The motion of the Division of Taxation for summary determination is granted; the petition of Douglas and Gayle Caires is denied; the notices of deficiency issued to petitioners on

June 5, 2000 are sustained; and, in addition to other penalties imposed by the notices of deficiency, a penalty pursuant to Tax Law § 2018 in the amount of $500.00 is hereby imposed.

DATED: Troy, New York
December 26, 2002

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE